1950

Book Review (reviewing W. Friedmann, Legal Theory, 2d Edition (1949))

Edward Hirsch Levi

BOOK REVIEWS

LEGAL THEORY, 2d Edition. By W. Friedmann.[1] London: Stevens and Sons, Ltd. 1949. 30s.

Professor Friedmann states that his purpose in this book is to give a "concise account of the main trends of legal philosophy" and to investigate the "relations between legal theory, social evolution and positive law." (vii). Professor Friedmann succeeds in giving a concise account of the outlines of numerous philosophies of law. The material covered is enormous and the summaries not only appear to be accurate but discerning. The achievement is a considerable one. It would be astonishing if similar thumbnail sketches of whole bodies of law could be meaningfully stated in a few pages in terms of the main concepts used. The reaction of an American teacher of law would probably be that a few pages on the whole of contracts, for example, could not be very helpful to a student, that anyone wishing to understand the system would have to work with it in its application to situations before the system became meaningful. But there has been a tradition in the teaching of philosophy which permits similar thumbnail sketches covering whole systems, and a good deal of Professor Friedmann's book is written in that tradition. That the tradition cannot be a wholly satisfying one to Professor Friedmann appears to be indicated by little flashes of criticism when the author, suddenly dropping the role of a restater of phrases and concepts, inquires as to the value of a particular system. In the main, however, the book is a series of summaries about philosophies of law from Aristotle through the modern realists, and if such summaries when well done are useful, then this book should fill a real need.

It is not clear, however, that such summaries even when well done are useful. The position which philosophy of law occupies in the professional world of the practitioner or the teacher of law is that of a kind of a religion which many people are glad to know exists, but which not very many people want to explore or to apply. It is of definite value to practitioners generally to have a few people writing about the philosophy of law. Their writings accomplish two purposes. In the first place, they set law apart from the activity of other trades' people. There is a commercial value in being so set apart, for the separation tends to justify restrictions on entry into the profession, and in addition no doubt there is a real sense of satisfaction in not only being part of a learned profession but one that has a philosophy as well. In the second place, the writings of philosophers of law can be used by practitioners as well as others to bolster up criticism which they wish to make of the welfare state, the Supreme Court, laissez-faire, or whatever topic happens to be discussed. There is no doubt, therefore, that philosophy of law has a kind of usefulness, and that kind of usefulness means that there must be a class of workers busy restating philosophy from time to time, summarizing the

[1] Professor of Public Law, University of Melbourne.

"schools", telling us about the "leaders" and the "followers", and in general taking care of the temple so that the sinners may have a religion. Even, or in one sense particularly, unintelligible summaries of past philosophies of law in this somewhat cynical view contribute to the welfare of the legal profession and it may be the world, but it is clear that Professor Friedmann would not have the usefulness of his excellent summaries judged in such fashion. Professor Friedmann is explicitly aware of the problem of usefulness or worthwhileness. Not only does he frequently criticize philosophies of law which he has stated because of the results to which some of their "astonishing doctrines" might lead (84) or the failure of phrases to be meaningful in application (See his criticism of Stammler, 100), but in addition he attempts to answer the common view of lawyers that philosophizing about the law is "a useless speculation of theories, irrevelant to the administration of law". (273). The answer which Professor Friedmann makes is the traditional one, but it may not be wholly satisfying.

The answer which Professor Friedmann makes is that all lawyers are legal philosophers "like everyone who has to solve legal problems" but their philosophy is often inarticulate. (274). Professor Friedmann rests his case for legal philosophy on the proposition that "On the whole those lawyers who are unconscious of their legal ideology are apt to do more harm than their more conscious colleagues. For their self delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and prejudices without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake". Unhappily however, it appears that a statement of philosophical principles, whether done by a German romanticist of what probably should be called an American neo-legal realist, can operate to insulate a lawyer from an awareness of what is going on, and certainly can make it psychologically easier for him, if it has any effect, to mould the law in accordance with beliefs and prejudices. It remains to be shown that prejudices cease to exist or are more easily controlled because they are stated; much of recent history seems to show the reverse. One cannot help thinking that in view of what people sometimes say when they speak out loud, that it is sometimes better, all things considered, if they remain silent. Professor Friedmann's book raises very sharply the question of whether philosophy of law has anything to contribute to the good of the legal profession, the law, or the world.

It is a little difficult to know what Professor Friedmann thinks is the proper scope for legal theory or philosophy of law. At one point he states that the fundamental question to be answered by legal theory is not less than the question "What is the purpose of life?" (423). In his criticism of Roscoe Pound, Professor Friedmann develops the point that legal theory cannot be used to give a basis for choosing between different types of political society. (422). He appears to argue that the unsolved problem of individual autonomy and the needs of the community is not a problem of legal or political theory but of human morality. (432). He states at

least twice that the choice between different methods of controlling administrative discretion "is a matter of positive administrative law not of fundamental legal theory". (460, 406). What appears to worry Professor Friedmann is that legal theory incorrectly conceived may prevent change in the direction of economic planning. One cannot be sure about this, because Professor Friedmann may really mean to delimit the philosophy of law from the most crucial questions of our day, although permitting it to have something to say about "order", whatever that may be. (422). But if this is so then one must ask what is the relationship between what Professor Friedmann thinks legal theory is and his statement of what he terms legal values of modern democracy, his statement that it is the U.S.S.R. which "has gone furthest in carrying out the legislative implications of the ideal of equality—by contrast with the ideal of freedom" (451), and his view that democracy is furthered by planning of the socialist type because participation in industrial management replaces what otherwise would be private economic activity. (455). Perhaps we should follow Professor Friedmann's course in dealing with the doubtful lawyer and ask Professor Friedmann to state the underlying assumptions upon which these ideas are based. A book on legal theory which begins by summarizing Aristotle and ends by attacking Professor Hayek may be intended to delimit the field of legal theory from the area of political theory, but there remains some doubt that perhaps the articulation of legal theory has served rather to give support to particular political ideas.

Professor Friedmann no doubt would agree that it is the ideal of rational discussion which supports his belief in the philosophy of law. The statement of the key concepts used by many philosophers of law may be a preliminary to such a discussion. Perhaps the same can be said of the statement of those problems which beset the modern world as set forth by Professor Friedmann in the last part of his book. But the discussion itself has not taken place. Such a discussion appears to be necessary if philosophy of law is to be helpful in the solution of problems of international order and individual freedom. The discipline of orderly discussion is necessary also to prevent the theory of law from degenerating into a statement of power words which appeal to the community, and which are set forth as values and goals, and are then used to justify action without discussion. Professor Friedmann has set forth a large task for himself in his next volume.

E. H. LEVI*

Chicago, Illinois

* Professor of Law, University of Chicago.